denied, 188 U. S. 742; *Newport Imp. Co.* v. *Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475. (3) The condition against keeping or using gasoline on the premises is not literally construed. While interpretation has made its meaning very indefinite, the courts seem to have applied various tests in order to do justice to the particular facts before them. In a situation similar to the principal case it was said that the reasonable use of gasoline was an implied exception to the condition. *First Cong. Church* v. *Holyoke Ins. Co., supra.* See *Smith* v. *German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368. Its use for cleaning purposes will not avoid the policy, *Columbia Planing Mill* v. *Am. Ins. Co.*, 59 Mo. App. 204; *Arnold* v. *Am. Ins. Co.*, 148 Cal. 660, 84 Pac. 182. So a use upon one occasion only, although such use causes the loss, has been held not to be a breach, *Springfield Ins. Co.* v. *Wade*, 95 Tex. 598, 68 S. W. 977, 93 Am. St. Rep. 870. See *Angier* v. *Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761, 65 Am. St. Rep. 685. But see *contra, Wheeler* v. *Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582. About as certain a test as can be laid down is to inquire whether the use in the given case was such a one as the parties to the contract had in mind would be a "necessary and contemplated use of the property." Anything beyond that is a breach, *Heron* v. *Phoenix Ins. Co.*, 180 Pa. 257, 40 Wkly. Notes Cas. 55, 36 L. R. A. 517, 57 Am. St. Rep. 638; *Kyte* v. *Com. Assur.* Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508. If a breach has actually occurred, some courts hold the policy is only suspended during the breach, *Phoenix Ins. Co.* v. *Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521. However, the weight of authority is that once there is a breach, the policy is void at the election of the insurer, whether the breach contributed to the loss or not, *Penn. Ins. Co.* v. *Faires*, 13 Tex. Civ. App. 111; *Norwaysz* v. *Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Boyer* v *Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338; *Bastian* v. *British Assur. Co.*, 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255.

INSURANCE—DIVISION OF SURPLUS—ACCOUNTING.—A statute provided that the surplus of a life insurance company should be divided among the policy holders "equitably and ratably, as the directors of said company shall and may from time to time ascertain, determine and report for division." *Held*: Policy holders are entitled to an accounting when the directors arbitrarily fix the amount to be divided. *White* v. *Provident Life & Trust Co.*, (Pa. 1912) 85 Atl. 463.

The insurance company is not a trustee of the surplus for the policy holders, but sustains the relation merely of a debtor to a creditor. *Cohen* v. *N. Y. Ins. Co.*, 50 N. Y. 610; *Equitable Life Assur. Soc.* v *Brown*, 213 U. S. 25. Accordingly an accounting cannot be compelled by a policy holder on the theory of enforcing a trust, *Pierce* v. *Equitable Assur. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; *Grieb* v. *Equitable Life Assur. Soc.*, 189 Fed. 498. But Massachusetts has held that the policy holder is equitably entitled, and that the insurance company "has no right to withhold the surplus as a corporation may withhold profits from a stockholder." Conse-

quently where the directors failed to exercise an honest discretion and good faith, an accounting was decreed, *Pierce* v. *Equitable Life Assur. Soc., supra.* While no other court has actually decreed an accounting, 1 COOLEY BRIEFS 123, it has been intimated in cases where an accounting was refused that in a proper case made the decision might be otherwise. The essential allegations suggested are: "An abuse of discretion in the apportionment," *Hudson* v. *Knickerbocker Life Insurance Co.,* 28 N. J. Eq. 167; "Fraud or other irregularity that would give equity jurisdiction," *Grieb* v. *Equitable Life Assur. Soc., supra; Gadd* v. *Equitable Life Assur. Soc.,* 97 Fed. 834; *Everson* v. *Equitable Life Assur. Soc.* 68 Fed. 258 affirmed, 71 Fed. 570; *Hunton* v. *Equitable Life Assur. Soc.,* 45 Fed. 661. The New York courts have said: "Inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision," *Uhlman* v. *N. Y. Life Ins. Co.,* 109 N. Y., 421, 17 N. E. 363, 4 Am. St. Rep. 482; *Greeff* v. *Equitable Assur. Soc.,* 160 N Y 19, 46 L. R. A. 288, 73 Am. St. Rep. 659. The decision of the principal case is the logical development from these cases.

JUDGMENT—DEATH OF PARTY—ENTRY OF JUDGMENT NUNC PRO TUNC.—After final hearing and argument of an action for specific performance, and before the filing of the opinion, one of the defendants died. The court directed the decree to be entered *nunc pro tunc* as of the date of the argument. Upon appeal this was urged as error. *Held,* no error. *Schaeffer* v. *Coldren,* (Penn. 1912) 85 Atl. 98.

Where the court has once acquired jurisdiction during the lifetime of a party, a judgment rendered against him after his death is not void, being merely erroneous and liable to be set aside,*City of New Orleans* v. *Gaines,* 138 U. S. 595; *Reid* v. *Holmes,* 127 Mass. 326;*Swasey* v. *Antram,* 24 Oh. St. 87; *Berkey* v. *Judd,* 27 Minn. 475. In some states the doctrine is otherwise, and such a judgment is absolutely null and void, *Life Assn.* v. *Fassett,* 102 Ill. 315; *Bragg* v. *Thompson,* 19 S. C. 572; *Succession of Hoggatt,* 36 La. Ann. 337. However this rule may be, there is another doctrine generally followed, that if a judgment is under advisement, and meanwhile one of the parties dies, the court will not allow the action to abate, but will enter judgment *nunc pro tunc* as of the time when the party was still alive, *New Orleans* v. *Warner,* 176 U. S. 92; *In re Page,* 50 Cal. 40; *Wilkins* v. *Wainright,* 173 Mass. 212; *Long* v. *Stafford,* 103 N. Y. 274; *Gunderman* v. *Gunnison,* 39 Mich. 313; *Dial* v. *Holter,* 6 Oh. St. 228. As is said in a well considered case on a slightly different proposition, the reason for the rule is that "An objection of this kind is so entirely technical in its nature, so contrary to the general principles of justice, that it is entitled to no peculiar favor," *Brown* v. *Wheeler,* 18 Conn. 198, 208. For an excellent note on the question, see 49 L. R. A. 153.

JURY—CHALLENGE FOR CAUSE—EFFECT OF FAILURE TO EXERCISE PEREMPTORY CHALLENGE.—Appellants, on trial for murder, interposed a challenge for cause against one of the jurors, which the trial court overruled and to which